Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1003

COUNTY OF IMPERIAL AND THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

Appeal From United States District Court, Southern District of California.

Reply to Response to Petition for Writ of Certiorari.

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Contrary to Respondents' assertions, grounds clearly exist for grant of certiorari. In fact, is is imperative that the Court provide for review.

As already discussed, the California Supreme Court upheld the enforceability of the export restriction in Mr. McDougal's use permit based on the adequate and independent ground of estoppel. (Pet. for Cert. C-6.) This Court correctly dismissed McDougal's earlier appeal for lack of a substantial federal question. (434 U.S. 899, 54 L.Ed.2d 187, 98 S.Ct. 294.)

The Court of Appeals has, however, affirmed an injunction which prevents enforcement of the very restriction upheld by the California Supreme Court. A direct conflict therefore exists between the respective decisions of the State Supreme Court and the Court of Appeals.

The conflict in decisions is manifest by the Superior Court's contempt judgment against McDougal. (Pet. for Cert. D-2.) Final determinations concerning said contempt await decision by this Court. (Refer to Pet. for Cert. at p. 5, fn. 1.)

Rule 19(1)(b) of the Court expressly provides for review of a decision rendered by a court of appeals which ". . . has decided an important state . . . question in a way in conflict with applicable state . . . law". Direct conflict between a decision by a federal court of appeals and a judgment by the highest court of a state, where state grounds for decision are applicable, is ground for review of the decision of the court of appeals. (Stern and Gressman, *Supreme Court Practice* (5th Ed., 1978) pp. 280-282.)

Respondents would have the Court believe they are third-party strangers to the McDougal litigation, who are directly attacking a statute on constitutional grounds. (Response to Pet. for Cert. at pp. 5-6, citing *City of Altus, Oklahoma v. Carr,* 255 F.Supp. 828 (W.D. Tex. 1966) and *Hughes v. Oklahoma,* 99 S.Ct. 1927 (1979).) Such portrayal is inaccurate and the authorities cited are inapposite.

Respondents are *not* strangers but contractors of McDougal who desire to export water pumped from his well to Mexico. Guillermo Gallego Munoz, one of the Respondents, participated in the Superior Court

trial and served as *amicus curiae* in unsuccessfully urging the State Supreme Court to find the subject export restriction violative of the Commerce Clause. (Pet. for Cert. at pp. 8-9.)

Neither the *McDougal* case nor Respondents' subsequent action involve a challenge to a statute or county-wide ordinance. In *McDougal*, the State Supreme Court upheld a use permit restriction which affects only a particular parcel. (Refer to Pet. for Cert. at p. 10 and C-5 for the proposition that the terms of a conditional use permit run with the land.)

Respondents are not waging a challenge against any general anti-export policy of the County. They are instead attempting to enlarge on McDougal's property rights. Their action alleges the California Supreme Court erred in deciding *McDougal*. (Refer to Pet. for Cert. at p. 7.) They have in reality been allowed by collateral attack to relitigate the *McDougal* case.

The case of *Hughes v. Oklahoma* (*supra*) has been demonstrated as not on point (Pet. for Cert. at pp. 16-18). *City of Altus, Oklahoma v. Carr* (*supra*) is similarly distinguishable.

In *City of Altus*, the petitioner succeeded in directly challenging a statute enacted to prevent Texas ground water from being transported across the state boundary. As shown, the *McDougal* case involved no such blanket prohibition but, instead, dealt with an export restriction applying to a single parcel.

Mr. McDougal was held estopped from challenging the subject restriction and bound thereby. No analogous decision was rendered by the highest court of the State of Texas in *City of Altus* so as to bring into focus the issues which are here presented.

Further, ground water law in Texas contrasts sharply from that in California. Compare, for example, the doctrine of "correlative rights" as announced in *Katz v. Walkinshaw,* 141 Cal. 116, 74 P. 766 (1903) with the Texas "rule of capture" referred to in *City of Altus, Oklahoma v. Carr* (*supra*) at page 833. Were the County of Imperial to enact a general ordinance designed, to prevent basin overdraft by prohibiting exploration of all local ground water, it is not clear, on direct attack, that *City of Altus, Oklahoma v. Carr* would require such an ordinance to be held invalid.

To conclude, the California Supreme Court finally adjudicated the enforceability of the export restriction in McDougal's use permit using adequate state grounds. Due to the refusal of the District Court and Court of Appeals to heed the doctrine of *res judicata* and provisions of the Anti-Injunction Act, Respondents have by collateral attack emasculated the decision of the State Supreme Court. It is of critical public importance that this Court allow for review of the decision of the Court of Appeals.

Respectfully submitted,

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